IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 183 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KERSHI PIROZSHA BHAGVAKAR

Versus

THE STATE OF GUJARAT

Appearance:

MR MP SHAH for Petitioner No. 1

MS. KRUTI M SHAH for Petitioner No. 1

PUBLIC PROSECUTOR for Respondent No. 1

MR UDAYAN P VYAS for Respondent No. 2

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 05/09/2002

ORAL JUDGEMENT

1. The revisioner herein had lodged a criminal complaint before the learned Chief Judicial Magistrate, Surat, being Criminal Complaint No.89 of 1996, against the present respondent No.2 for the offences punishable under Sections 406, 420 and 114 of Indian Penal Code. The allegations in the complaint are that the complainant is engaged in the business of building materials. Respondent No.2, on being acquainted with the

complainant, impressed upon the complainant about his having been engaged in huge construction work and the complainant was impressed thereby. Initially, respondent No.2 made some purchases on cash basis and thereafter, he started making purchases on credit. At that time, he promised that he would make the payment as and when he gets his dues from others, for whom he is working. The purchases were worth Rs.2,00,661/=. When the complainant started asking for money, initially, the accused abused him, but then, ultimately said "what money and for what", all your documents are with me, you can take whatever action you like.

2. It is, therefore, alleged in the complaint that respondent No.2 had, from the beginning, an ill-intention of cheating the complainant, and therefore, respondent No.2 presented incorrect and magnified version of his business and thereby secured faith and trust of the complainant to get goods on credit.

3. The said complaint was sent by the learned Chief Judicial Magistrate for investigation to the police in exercise of powers under Section 156(3) of Cr.P.C. The police, after investigation, filed a charge-sheet against respondent No.2. Respondent No.2 then tendered an application before the learned Chief Judicial Magistrate, Surat at Ex.5 for his discharge, stating that no ingredients of any of the offences alleged are made out in the complaint and that the complaint is only a counterblast to the complaint lodged by him against the complainant under Section 138 of Negotiable Instruments Act. Learned Chief Judicial Magistrate, after hearing both the sides and after considering the materials on record, came to conclusion that, prima facie, there is sufficient material for prosecuting the complaint against the Respondent No.2 herein, and therefore, rejected the application at Ex.5, by order dated June 30, 2001.

4. The said order is carried in Revision Application before the Sessions Court, by preferring Criminal Revision Application No.102 of 2001. The said Revision Application came to be allowed by judgement and order dated 18.03.2002 by the learned Additional Sessions Judge, Surat. Learned Additional Sessions Judge observed that the present complaint was a counterblast to the complaint lodged against the complainant under Section 138 of Negotiable Instruments Act. It was also observed that the transaction was purely commercial and the dispute, therefore, is of a civil nature. Learned Sessions Judge also observed that according to the accused, Respondent No.2 herein, the vouchers and bills,

relied upon by the complainant in his complaint, were incorrect and bogus and the investigating officer has not made any investigation in that direction. Learned Judge has, however, observed whether the complaint is a counterblast to the earlier complaint lodged by the accused or not is a question of evidence and cannot be decided at this stage. Learned Judge has observed that the accused was introduced to the complainant by a friend Arvindbhai Shah and the contention of the complainant in the complaint, therefore, is not proper and correct. It is observed that from the statement, it appears that the accused has "purchased" the goods from the complainant and the complainant has borrowed money from the accused. The learned Judge, therefore, came to the conclusion that this is a civil transaction. Learned Judge observed that there is nothing to indicate that the intention of the accused was of cheating the complainant from the beginning. He has not indicated any material. Learned Judge has made some observations regarding the requirements to be followed by the Magistrate while sending complaint for investigation to the police under Section 156(3) of Cr.P.C., which, in opinion of this Court are not relevant. However, by making these observations, the Revision Application came to be allowed and the accused No.2 herein came to be discharged of the charges levelled against him.

5. Aggrieved by the said judgement and order dated 18.03.2002 in Criminal Revision Application No.102 of 2001, the revisioner-original complainant has approached this Court.

6. Ms.Shah, learned advocate appearing for the revisioner, submitted that for considering the question whether charge is required to be framed and the accused is required to be discharged, the Court has to see the prima facie material and in that, the complaint, the charge-sheet and the supporting charge-sheet papers are required to be examined prima facie. She submitted that the statements of Lallubhai Premjibhai Patel, Nitinbhai Premjibhai Patel, Navinbhai Shivabhai Mewada, Mukeshbhai Chandubhai Chauhan and Arvindbhai Shah, recorded by the police indicate that the accused has committed the offences. Ms.Shah relied upon decisions of the Apex Court to indicate that there could be instances, where civil as well as criminal offences are committed in course of commercial or civil transactions and in such eventuality, both the proceedings can be initiated parallel to each other. She submitted the fact that, initially, purchases were made by the accused on credit, by itself will not negative the allegation made in the

complaint by the complainant about faith or trust being created in the mind of the complainant for selling goods on credit, whereas the accused has no intention of making the payment for the goods purchased, and at this stage, the complaint could not have been rejected, discharging the accused person. She urged that the Court below has considered the case as it is, without evaluating the evidence after the trial. She urged that the Revision Application may be allowed.

7. Learned Advocate Mr.Vyas, appearing for Respondent No.2, has opposed this Revision Application. According to him neither the ingredients of Sections 406 or 420 are, even prima facie, constituted. He submitted that the dispute between the parties is purely of a civil nature. At the most, it can be said to be a breach of contract between the parties, and in my opinion, it can be either criminal breach of trust or cheating, as the sale was on credit. Even as per the admission made by the complainant in his statement, a credit sale cannot create a breach of trust and there is no entrustment of the property. Therefore, that offence cannot be prosecuted. He submitted that, in fact, the complainant had borrowed money from the accused against cheques which were not encashed and, therefore, a complaint under Section 138 of Negotiable Instruments Act came to be filed by the accused against the complainant. As a counterblast thereto, the present complaint is lodged. Mr.Vyas places reliance on the decisions stated below :

(i) STATE OF GUJARAT VS.JASWANTLAL NATHALAL,
AIR 1968 SUPREME COURT CASES 700;

(ii) B.RAMESH & ORS. VS. STATE OF GUJARAT,
1997 (2) GLR 1655.

Mr.Vyas urged that the Revision Application, therefore, may be dismissed.

8. Having heard the rival sides' contentions, at the outset, it would be appropriate to state that as per the settled legal proposition, criminal as well as civil proceedings can be initiated together and there could be instances where civil as well as criminal offences are committed in course of commercial or civil transactions and in such eventuality, both the proceedings can be initiated similarly. This position is settled by the following decisions :

(i) RAJESH BAJAJ VS. STATE NCT OF DELHI &
ORS., (1999) 3 SCC 259;

(ii) M.KRISHNAN VS. VIJAY SINGH & ANR., 2002 SUPREME COURT CASES (CRI) 19; and

(iii) MEDCHL CHEMICALS & PHARMA (P) LTD. VS. BIOLOGICAL E.LTD. & ORS., (2000) 3 SUPREME COURT CASES 269.

9. It is also a settled proposition that for considering the question whether charge is required to be framed or whether the accused is required to be discharged, the Court has to examine the evidence before it and has to accept it as it is rather than entering into the arena of its evaluation and its acceptability, trustworthiness, or otherwise. In the case of B.Ramesh & Ors. Vs. State of Gujarat (supra) relied upon by Mr.Vyas, the Court observed that for determining the question whether the dispute is of a civil nature or a criminal nature, the Court has to ask itself, firstly, whether the complaint, prima facie, discloses the offence? Or whether it is exclusively of the Civil nature ? The Court then should examine the second question as to whether the specific name of the accused, and the role played by him is attributed to him and the third question is whether the Court should examine whether the complaint is of such a vague, absurd, improbable or mischievous nature.

10. For examining these aspects, the Court has to examine the complaint and the material collected by the investigating officer. In the instant case, as stated above, the complaint bears specific allegations against the accused of having acquired faith / trust of the complainant by giving an incorrect and magnified version about his business and making cash purchases initially and the complainant having sold the goods to the accused out of that trust. During the course of investigation, his statement was recorded, where also he has given a little more detailed version about the transactions and what was told to him by the accused about his business. The version of the complainant gets support from the statement of Nitinbhai Premjibhai Patel (Annexure-F), who works with the complainant. There are statements of Navinbhai Shivrambhai Mevada (Annexure-G) and Mukeshbhai Chandubhai Chauhan (Annexure-H) who also give similar version. There is also a similar version of statement of Arvindbhai Panachand Shah (Annexure-I). He confirms having introduced the complainant and the accused to each other and having been told by the complainant about and the purchases made by the accused from the complainant the accused not making the payment on the ground that he

will make the payment when he receives money and then disowning the liability.

11. It is true that the transaction is of a civil nature, but to rule out the possibility of the element of the criminality at this stage would be too risky and the question is to be considered in light of the material on record. Even the Learned Additional Sessions Judge has also observed in his judgment and order impugned herein that it is a question of evidence as to whether the complaint is a counterblast to the complaint by the accused under Section 138 of Negotiable Instruments Act. Likewise, whether bills and vouchers, relied upon by the complainant, are genuine or bogus would also be a question that could be decided after recording evidence. It is not possible to comprehend as to how the accused could be discharged in face of the evidence collected. Likewise, the observation that there is no material or evidence on record to show that there was any intention to cheat, also cannot be upheld, for the reason that intention is a mental phenomena that can be perceived or deduced only after there is sufficient evidence or material on record which can be examined and appreciated only at the trial. At this preliminary stage, no conclusion could have been arrived at by the Sessions Court.

12. In the opinion of this Court, the contentions raised by the accused that bills are bogus, that the transaction is of a Civil nature and, therefore, there is no criminality in it, that the complaint is a counterblast, are all defences of the accused and they cannot be considered at this stage of considering the question of discharge. The order of the Sessions Court, therefore, cannot be permitted to stand, as, this would result in scuttling the complaint at the initial stage by entering the impermissible arena of evaluating statement without recording evidence of the prosecution. The Revision Application, therefore, deserves to be allowed.

13. The Revision Application is accordingly allowed. The order dated 18.03.2002 passed by the learned 2nd Extra Assistant Judge & Additional Sessions Judge, Surat below Exh.10 in Criminal Revision Application No.102 of 2001 is hereby quashed and set aside. Criminal Case No.452 of 1997 is ordered to be restored on the file of the learned Chief Judicial Magistrate. Learned Chief Judicial Magistrate is directed to proceed with the trial in accordance with law. Rule made absolute. Direct service permitted.

Sd/-

[A.L.DAVE, J]

'Bhavesh'